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Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1695

HARVEY ROSENBERG, *Petitioner,*

v.

LEON D. LAFFAL, ET AL., *Respondents.*

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF RESPONDENTS IN OPPOSITION

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INDEX

Page

STATEMENT OF THE CASE 1

ARGUMENT

I. Did the petitioner waive the defense of lack of jurisdiction over the person by his failure to move to quash service of process after he was personally served on July 7, 1970?..... 4

II. The District Judge who tried this case without a jury was impartial in his conduct toward the petitioner 5

III. The law of Maryland and the Federal Rules of Civil Procedure do not require representative shareholders in a derivative action to make demand upon the directors and upon the shareholders to file suit on behalf of the corporation when such a demand would be futile in that the defendants would not institute suit against themselves 10

IV. The award of punitive damages by the District Court was correct and is supported by the weight of the evidence and the law of Maryland..... 15

V. The District Court did not err in awarding damages in the amount of $15,062.15 against the corporate attorney for advising the return of that amount to three investors after the investors had threatened to sue the defendant personally 23

CONCLUSION 25

APPENDIX 1a

TABLE OF AUTHORITIES

Ayash v. *United States*, 352 F.2d 1009 (10th Cir. 1965) 9

Bank of Utah v. *Commercial Security Bank*, 369 F.2d 19 (10th Cir. 1966) 9

Page

Bethlehem Steel Co. v. *NLRB*, 120 F.2d 641, 74 App. D.C. 52 (1941) 9, 10
Bowles v. *Lentin*, 151 F.2d 615 (7th Cir. 1945)..... 10
Buckley v. *Altheimer*, 152 F.2d 502 (7th Cir. 1945).... 10
Damazo v. *Whaby*, 259 Md. 627, 270 A.2d 814 (1970).. 18
Dennis v. *Baltimore Transit Co.*, 189 Md. 610, 56 A.2d 813 (1948) 17
Great Atlantic & Pacific Tea Co. v. *Paul*, 261 A.2d 731 (Md. App. 1970) 17
Heinze v. *Murphy*, 180 Md. 423, 24 A.2d 917 (1942).... 18
Jordan v. *United States*, 295 F.2d 355 (10th Cir. 1961) 9
Levitt v. *Johnson*, 334 F.2d 815 (1st Cir. 1964)..... 14
Low v. *Nunan*, 154 F.2d 261 (2d Cir. 1946) 10
McClung-Logan Equipment Co., Inc. v. *Thomas*, 226 Md. 136, 172 A.2d 494 (1961) 18
Meltzer v. *Atlantic Research Corp.*, 330 F.2d 946, 948 (4th Cir. 1960) 14
Mumford v. *Stanton, et al.*, 254 Md. 697, 255 A.2d 359 (1959) 16
NLRB v. *Phaostron Instrument & Electronics Co.*, 344 F.2d 855 (9th Cir. 1965) 9
Parish v. *Maryland & Virginia Milk Producers Ass'n*, 250 Md. 224, 242, A.2d 512 (1968) 11, 13
Peitzman v. *City of Illmo*, 141 F.2d 956 (8th Cir. 1944), cert. den. 323 U.S. 718, 65 S.Ct. 47, 89 L.Ed. 577 (1944) 15
Pomerantz v. *Clark*, 101 F.Supp. 341 (E.D. Mass. 1951) 14
Reamer v. *Kessler*, 233 Md. 311, 196 A.2d 896 (1964) 16
Safeway Stores v. *Barrack*, 210 Md. 168, 122 A.2d 457 (1956) 18
Superior Constr. Co. v. *Elmo*, 204 Md. 1, 102 A.2d 739, 104 A.2d 581 (1954)..... 21
Union Carbide v. *Nisley*, 300 F.2d 561 (10th Cir. 1961) 9
Vancherie v. *Siperly*, 243 Md. 366, 221 A.2d 356 (1966) 17
Watson v. *Calvert Bldg. & Loan Ass'n*, 91 Md. 25, 45 A. 879 (1900) 16
Welder v. *Mercer*, 247 Ark. 999, 448 S.W.2d 952 (1970) 19

Page

OTHER AUTHORITIES

27 American Law Reports 3d 1274 19
Baker & Cary, *Cases on Corporations*, p. 233 (3rd Ed. 1959) 14
Cardozo, *The Nature of the Judicial Process* 9
Code of Professional Responsibility, American Bar Association (1971), Canon 5, EC 5-1, Canon 9, EC 9-6 .....6, 24
Punitive Damages in Tort Cases, 44 Harvard Law Review 1173 (June 1931) 20
3B *Moore's Federal Practice* § 23.1.19..... 11

FEDERAL RULES OF CIVIL PROCEDURE

Rule 12(h)(1) 4
Rule 23.1 .....10, 11
Rule 37 6

STATUTES

Title 11, U.S.C. § 96 24
Title 28, U.S.C. § 1401 8

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BRIEF OF RESPONDENTS IN OPPOSITION

STATEMENT OF THE CASE

In September and October of 1968, twenty investors paid a total of $91,625.11 to the defendant, Harvey Rosenberg, for an interest in a new corporation then being formed called Urban Systems Research, Inc. Mr. Rosenberg was serving as corporate attorney, apparently retained initially by Mr. Niedermayer.

On October 28, 1968, Mr. Rosenberg opened a checking account for Urban, designating himself as secretary of the corporation. Mr. Rosenberg conceded on the record that he did not advise the incorporators and shareholders of Urban to hold an initial meeting; to elect directors; nor, to adopt bylaws.

During this same period of time, in the fall of 1968, Mr. Rosenberg was also attorney for another corporation, Aardvark Audio Productions, Inc. In October of that year, Mr. Rosenberg arranged to transfer $22,597.60 to Aardvark from Urban, ostensibly as a loan. The checks were signed by Mr. Rosenberg and Mr. Niedermayer. Initially, $20,000 was advanced; and, thereafter, additional funds were transferred for miscellaneous items to total $22,597.60. (Court's Finding No. 7 of June 28, 1972. Petition, Appendix page B. 2).

One year later, on October 31, 1969, promissory notes totalling $31,000 were executed by Aardvark to Ebony as security for the funds advanced by Urban (Court's Finding No. 9 of June 28, 1972. Petition, Appendix B. 3).[1] Throughout the course of these transactions, from September, 1968 to October, 1969, Mr. Rosenberg continued to serve as attorney for Urban, Ebony and Aardvark (Court's Findings No. 8 and No. 13 of June 28, 1972).

Urban did not become an active corporation, and except for the loan transactions recounted above, did not engage in any other activities. Ebony was incorporated in November, 1968 and, after all remaining funds were transferred, Urban ceased all functions and remained in legal limbo.

In January, 1969, stock certificates and promissory notes were issued by Ebony to all Urban investors. The first meeting of Ebony stockholders was held on December 18, 1969, thirteen months after incorporation. (Court's Finding No. 16 of June 28, 1972); and, the

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[1] The new corporation, Ebony, was organized on November 14, 1968, and without a merger, all assets were transferred from Urban to Ebony. Trial Court's Finding No. 11 of June 28, 1972.

Board of Directors of Ebony met for the first time on October 6, 1969. (Court's Finding No. 15).

Mr. Rosenberg did not explain the duties of directors to anybody; he did not explain the necessity of electing officers; nor, did he explain the necessity of adopting corporate resolutions, or any of the fiduciary duties of directors.

In July, 1969, upon the advice of Mr. Rosenberg, Ebony returned the investments of Mr. Simon and Mr. Zadek totalling $10,041.68. A third investor also received a full refund in the amount of $5,020.84 in October of 1969, this too based upon Mr. Rosenberg's recommendation. The trial court found that Mr. Rosenberg advised the return of the funds because he feared that legal action would be taken against him personally. (Court's Finding No. 22 of June 28, 1972). The trial court held Mr. Rosenberg responsible for the preferential return of $15,062.52 to the three investors. (Conclusion of Law, No. 6 Petition, Appendix B. 8).

A principal incentive of the investors was the plan of the corporation to make a public offering. At that time, the amount of the "loan" by each shareholder would be convertible to stock at $4.00 per share. The corporation did not file a registration statement nor make a public offering. In fact, the corporate attorney's only effort toward this end was "a single handwritten yellow-tablet page". (Court's Findings of Fact, Nos. 12 and 13. Petition, Appendix B. 3-4)

On January 12, 1970, Ebony held its second and final meeting of shareholders and voted to terminate all employees and to cease any further attempts to do business. At that time, corporate assets totalled $9,295.65, including a checking account of $6,744.30, which by

time of trial had been depleted to $138.00. Thereafter, on February 3, 1970, this cause of action was filed by four shareholders on behalf of the corporation.

ARGUMENT

I

DID THE PETITIONER WAIVE THE DEFENSE OF LACK OF JURISDICTION OVER THE PERSON BY HIS FAILURE TO MOVE TO QUASH SERVICE OF PROCESS AFTER HE WAS PERSONALLY SERVED ON JULY 7, 1970?

This suit was filed in the United States District Court for the District of Columbia on February 3, 1970. The defendant Rosenberg was served by a special process server on February 18, 1970. See Docket included as Appendix A, page 3.

On March 31, 1970, the defendant Rosenberg filed a Motion to Dismiss, or in the alternative, to Quash Service of Process. On May 1, 1970, the defendant's Motion to Quash was granted. Thereafter alias summonses were issued on May 28, June 26, and July 2 and Mr. Rosenberg was served personally on July 7, 1970. After special dispensation was granted by plaintiffs, Mr. Rosenberg filed an Answer to the Complaint on October 8, 1970.

The Docket reflects that in the interim between service of process on July 7, 1970 and the filing of the Answer on October 8, 1970, Mr. Rosenberg did not move to quash, nor did he raise the issue of lack of jurisdiction over the person. He now raises this point for the first time.

The issue is disposed of by Rule 12(h)(1) of the Federal Rules of Civil Procedure which states in pertinent part:

> "(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process,

> or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in Subdivision (g), or (B) if it is neither made by motion under this Rule nor included in a responsive pleading . . ."

Respondents submit that since the petitioner failed to attack jurisdiction in the trial court, this defense is waived.

II

THE DISTRICT JUDGE WHO TRIED THIS CASE WITHOUT A JURY WAS FAIR AND IMPARTIAL IN HIS CONDUCT TOWARD THE PETITIONER.

Counsel for petitioner sets forth various pretrial matters to support the contention that the District Court prejudged their case. Particular reference is made to the difficulties in obtaining service on Mr. Rosenberg which culminated in Judge Pratt's suggestion that he should submit to service of process (Page 25 of the Petition)

Reference to the Docket in this case reveals the difficulties encountered in obtaining service, contrary to petitioner's misconception that "no other service of original process was attempted" (Page 24 of the Petition)

After the original service was quashed on May 1, 1970, alias summons were issued on May 28, June 26, and July 2, 1970. The defendant was finally served on July 7, 1970, and then, on October 8, 1970, his Answer was filed—eight months after suit was instituted.

This unconscionable delay in bringing the case to issue was predicated solely upon the difficulties in obtaining service of process on a member of the bar, a lawyer who maintained an office in the District of Columbia (TR V.II, p. 58). The trial court's expressed

displeasure with this activity is consistent with his function and the Code of Professional Responsibility:

> "Every lawyer owes a solemn duty to uphold the integrity and honor of his profession; to encourage respect for the law and for the courts and the judges thereof; . . . to conduct himself so as to reflect credit on the legal profession and to inspire the confidence, respect and trust of his clients and of the public; and to strive to avoid not only professional impropriety but also the appearance of impropriety."[2]

Mr. Rosenberg's obvious reluctance to become a party in this case did nothing to dispel the impression that he was not innocent of the allegations set forth in the Complaint.

Petitioner alludes to the Motion to Compel Answers to Interrogatories and the Court's subsequent award of counsel fees as also being indicative of the bias of the trial judge. Rule 37 of the Federal Rules of Civil Procedure provides for sanctions against a party who fails to provide adequate discovery, and Subsection (3) of that Rule states, "For purposes of this subdivision, an evasive or incomplete answer is to be treated as a failure to answer".

Subsection (4) of the Rule provides for costs and attorney's fees when a party's failure to make discovery necessitates a motion to compel answers.

A plain reading of the Rule clearly justifies the minimal attorney's fees awarded by the Court and certainly does not reflect bias by the trial judge.

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[2] Code of Professional Responsibility, Canon 9, EC 9-6.

Petitioner has misstated the record concerning Rosenberg's demand for a jury trial. Petitioner asserts:

> "By ruling that defendant Rosenberg was not entitled to a jury trial and by having strictly a court trial, the trial judge spun his net to enclose Rosenberg fully and to leave him strictly at the mercy of his prejudgment" (Petition, Page 31).

This is incorrect. The trial court did not strike Rosenberg's jury demand. To the contrary, counsel for Rosenberg waived his jury demand in a praecipe filed on March 29, 1972, which noted "Waiver of jury demand on all issues by all the parties". This praecipe is signed by counsel for all parties, including counsel for Rosenberg. (See docket entry, Appendix, Page 8)

Plaintiffs did file a motion to strike the jury demand, but that motion pertained only to the other defendants and not to Mr. Rosenberg. The Memorandum of Points and Authorities filed with the Motion asserted that Mr. Rosenberg's jury demand was proper, by the following language:

> "It is another matter as to the jury demand by the defendant corporation in their asserted cross-claim against the defendant Rosenberg. In addition to breach of fiduciary duty, the cross-claimants allege malpractice and negligence which arise at law and a jury demand is proper on the cross-claim."
>
> Similarly, the defendant Rosenberg has demanded a jury trial in his reply to the cross-claim filed by the defendant Purnell."[3]

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[3] The plaintiffs did not demand a jury trial against any defendant.

On October 22, 1971, the District Court granted a Motion to Strike the Jury Demand of the other defendants but left Rosenberg's demand in the case. This remained until voluntarily waived by counsel for Rosenberg on March 29, 1972.

The petitioner is overreaching in his attempt to show prejudice by the trial judge. Counsel for respondents protests most vigorously when this attempt results in a misstatement of the record, whether done deliberately or through inadvertence.

The petitioner seems to assert that the denial of the Motion for a Change of Venue is illustrative of some bias by the District Court. It should be pointed out that Judge Curran initially ruled that venue did lie in the District of Columbia.[4] The subsequent Motion before Judge Pratt was already controlled by the law of the case, which was based upon 28 U.S.C. 1401, providing for venue in a suit by a stockholder.

Plaintiffs' Exhibit 58 was not disclosed at pretrial, but was reserved for impeachment after Mr. Rosenberg was less than candid in his oral deposition. Mr. Rosenberg had testified that he was not threatened with a lawsuit in connection with the return of the investment by Simon, Zadek and Gershen; and, that the investment was returned long after he was asked to return the funds.

The transcript further discloses that Exhibit 58 was obtained after the deposition and established that Mr. Rosenberg was threatened with a suit personally in a

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[4] This ruling is reflected on the Docket dated May 1, 1970, at the same time that he granted defendant Rosenberg's Motion to Quash Service of Process.

letter dated July 16, 1969 prior to the refund on July 22, 1969.

Counsel for plaintiff was not required by the pretrial order to disclose impeachment evidence. This is permissible trial tactics if the witness persists in a misstatement of fact.

A trial judge sitting without a jury must be granted a certain amount of latitude. "A federal judge is not a mere umpire; 'he has both the responsibility of assuring the proper conduct of the trial and the power to bring out the facts of the case.' " *Bank of Utah* v. *Commercial Security Bank,* 369 F.2d 19, 28, (10th Cir. 1966), citing *Jordan* v. *United States,* 295 F.2d 355 (10th Cir. 1961); *Union Carbide* v. *Nisley,* 300 F.2d 561, 586 (10th Cir. 1962); and, *Ayash* v. *United States,* 352 F.2d 1009 (10th Cir. 1965).

If, in the course of pretrial, Judge Pratt reflected his feelings in matters which were carried over into the trial of this case, they were based upon the conduct of a member of the bar who was a named defendant. "The mere existence and reflection of feeling in the course of a trial does not disqualify a presiding officer or call for a reversal. It does not constitute 'bias and prejudice' ..." *Bethlehem Steel Co.* v. *NLRB,* 120 F.2d 641, 652, 74 App.D.C. 52 (1941).[5]

It was pointed out in *NLRB* v. *Phaostron Instrument & Electronics Co.,* 344 F.2d 855, 858, (9th Cir. 1965), that, "In the conduct of any judicial or quasi-judicial hearing, reasonable discretion must be vested in the

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[5] Citing "The great tides and currents which engulf the rest of men, do not turn aside in their course, and pass the judges by." Cardozo, The Nature of the Judicial Process, 168.

officer who guides the course of the proceedings" citing, *Bethlehem Steel* v. *NLRB, supra.*

And, in *Bowles* v. *Lentin,* 151 F.2d 615, 620 (7th Cir. 1945), that, "In the absence of a jury, the court has wide latitude in commenting upon the occurrences at trial, and the disposition of courts to reverse judgments because of minor excesses in the exercise of the judge's authority at the trial has much abated." (citations omitted).

The Second Circuit rejected a similar complaint in *Low* v. *Nunan,* 154 F.2d 261, 264 (2nd Cir. 1946), and stated that, "Such displays of impatience should be restrained in the presence of a jury. But, in the absence of a jury, they are not to be taken as signs of improper bias." Citing *Buckley* v. *Altheimer,* 152 F.2d 502, 511 (7th Cir. 1945).

III

THE LAW OF MARYLAND AND THE FEDERAL RULES OF CIVIL PROCEDURE DO NOT REQUIRE REPRESENTATIVE SHAREHOLDERS IN A DERIVATIVE ACTION TO MAKE DEMAND UPON THE DIRECTORS AND UPON THE SHAREHOLDERS TO FILE SUIT ON BEHALF OF THE CORPORATION WHEN SUCH A DEMAND WOULD BE FUTILE IN THAT THE DEFENDANTS WOULD NOT INSTITUTE SUIT AGAINST THEMSELVES.

The plaintiffs did not make a demand upon the directors nor upon the shareholders to bring suit and so asserted in the complaint in compliance with Rule 23.1 of the Federal Rules of Civil Procedure which provides in pertinent part as follows:

> "The Complaint shall also allege with particularity the efforts if any made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the share-

> holders or members, and the reasons for his failure to obtain the action or for not making the effort."

The Complaint met this requirement with the following allegations:

> "No demand has been made upon the corporation to institute this action on its own behalf because such demand would be futile inasmuch as it is dominated by the defendant Rosenberg, the principal wrongdoer. In addition, the individual defendants are designated directors of the corporation and would not institute suit against themselves."[6]

The District Court ruled that the plaintiffs did have standing to bring this derivative suit and agreed with the asserted reason that the demand would have been futile, citing *Parish* v. *Maryland & Virginia Milk Producers Ass'n.*, 250 Md. 224, 242 A.2d 512 (1968), Rule 23.1 of the Federal Rules of Civil Procedure and 3B Moore's Federal Practice, 23.1.19.[7]

A closer examination of the parties lends support to the reasoning of the trial court.

Out of the twenty orignial shareholders, three had their interest extinguished by the refund of their total investment. Out of the remaining seventeen, four were plaintiffs and four were defendants.

Lawrence A. Purnell, a defendant, was the president and director in apparent control of corporate operations. He testified openly and warmly at the trial

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[6] Paragraph 5 of the verified Complaint.

[7] Conclusions of Law, No. 2, Petition, Appendix B. 6.

concerning his relationship and respect for Harvey Rosenberg.

> "WITNESS: Well, I have a very high personal regard for Mr. Rosenberg and during that time, we became very close friends. Mr. Rosenberg never did anything to harm me or anyone else, I don't think. When he was down in the divorce court—" (Petition, pp. 52-53)

This defendant paid himself a salary of $12,536 for a ten month period (TR V.I, pp. 105-10); and this was for part-time work (TR V.I, p. 107), in an area in which he was totally inexperienced.

It is submitted that his admitted close relationship with Mr. Rosenberg and his own involvement in these affairs would militate against this defendant pursuing any lawsuit on behalf of the corporation.

The Court rendered judgment against Mr. Purnell in the amount of $4,259.51 which was not appealed.

Mr. Harry Neidermayer was a designated director and had served as the interim president of Urban. He also volunteered to serve as a member of the stockholders committee which was appointed to seek counsel and explore the possibilities of a lawsuit. (TR V.I, p. 23).

The Court found Mr. Neidemayer liable for damages in the amount of $22,597.60 (jointly and severally with Mr. Rosenberg), which was appealed and then dismissed. Thus, his culpability is well established.

Mrs. Emily T. Jackson was a designated secretary of Ebony and the principal shareholder with 30,000 shares.

The remaining shareholders who were not defendants held a total of 27,091 shares.

The four plaintiffs owned a total of 6,254 shares.

Dr. William Statom was a director and at the trial, the Court dismissed the case against both him and Mrs. Jackson.

Obviously these defendants were not going to institute any action against themselves, either individually or in their official capacity. A serious question could also be raised as to why Mr. Neidermayer volunteered to serve on the stockholders committee.

Another problem faced the plaintiffs. Who were the officers and directors? There had never been an election of either officers or directors (Court's Findings of Fact, No. 5 and 17). Could the directors who had been designated by ultra vires acts legally authorize a lawsuit on behalf of the corporation?

These facts clearly support the futility of a demand and the Trial Court correctly found in favor of plaintiffs on this question.

The Petitioner cites *Parish, supra*, in support of the proposition that a demand should have been made on the shareholders. In that case, the Court pointed out that the shareholders passed a resolution agreeing to indemnify the board members for the payment of any judgment. "This extraordinary action indicates the futility of requiring a prior demand on the members by the complainants." 242 A.2d 512, 546.

At the first meeting of the Board of Directors of Ebony held on October 6, 1969, the Minutes admitted in evidence as Plaintiffs' Exhibit 18, stated that "all actions by Mr. Purnell, and in particular those ques-

tionable items on advice of counsel, had the full approval of the Board."

At the second and final stockholders meeting on January 12, 1970, the Minutes noted an expression of confidence in Mr. Purnell. (Plaintiff's Exhibit 25).

Thus, we have a parallel situation with *Parish* which emphasizes the futility of a demand on either the shareholders or the directors.

In *Levitt* v. *Johnson,* 334 F.2d 815 (1st Cir. 1964), the District Court was reversed with the holding that plaintiff's failure to demand that the shareholders sue was unnecessary, citing *Pomerantz* v. *Clark,* 101 F. Supp. 341 (E. Mass. 1951): "To prevent these minority members from suing until they have acquired the support of the majority of their fellows is in most cases to throttle them." Certainly, this would have been the result in the instant case.

See also, Baker & Cary, *Cases on Corporations,* (3rd Ed. 1959), page 233.

The Fourth Circuit ruled that the requirement for a demand upon the directors is procedural and is therefore governed by Federal law, and held that "it was too much to expect that the Board would direct the corporation to sue themselves. Furthermore, such a suit as the plaintiff asked would be controlled by the Board and for this reason it is artless indeed, and faithless to the corporation, to leave the prosecution of it to the defendants therein." *Meltzer* v. *Atlantic Research Corp.,* 330 F.2d 946, 948 (4th Cir. 1960).

Respondents submit that the reasons set forth for failure to demand that suit be filed by the directors or the shareholders under this corporate organization was sufficient and the District Court was correct in its ruling.

IV

THE AWARD OF PUNITIVE DAMAGES BY THE DISTRICT COURT WAS CORRECT AND IS SUPPORTED BY THE WEIGHT OF THE EVIDENCE AND THE LAW OF MARYLAND.

A. An Action against an Attorney for Malpractice Sounds In Tort and Maryland Law Permits the Award of Punitive or Exemplary Damages.

The Petitioner misconstrues the nature of the cause of the action in this case and the theories upon which damages were recovered. Although the attorney-client relationship is contractual at its inception and similar in all respects to that which is created between a doctor and his patient, a malpractice growing out of that attorney-client relationship transcends its contractual aspects and gives rise to an action in tort. This question has been settled by the 8th Circuit in *Peitzman* v. *City of Illmo,* 141 F.2d 956, (8th Cir., 1944), cert. den. 323 U.S. 718, 65 S.Ct. 47, 89 L.Ed. 577 (1944). There, an action brought for negligent performance under a contract resulted in both compensatory and punitive damages being returned against defendants and they appealed, *inter alia,* on the grounds that the action was for a breach of contract for which punitive damages could not be awarded. In rejecting this argument, the United States Court of Appeals held "that where a covenant creates a duty, failure to perform that duty is the basis for an action in tort". [Citations omitted, page 961]. The court recognized that conduct which constitutes a mere breach of contract is not a tort but went on to say:

> "However, a contract may establish a relationship and failure to exercise proper care or tortious and intentional wrong in performing it may give rise to a tort liability which is not defeated because there was a contract." [*Ibid*]

The court placed significant importance on the nature of the action brought by the plaintiff. In this case, the plaintiff sued for professional malpractice, a cause of action which sounds in tort and not in contract. Therefore, the principles applicable to the law of punitive damages in tort actions should control.

The cases cited by petitioner on page 42 of the petition are not inapposite. In *Watson* v. *Calvert Bldg. & Loan Assn'.*, 91 Md. 25, 45 A. 879 (1900) and *Reamer* v. *Kessler*, 233 Md. 311, 196 A.2d 896 (1964), the courts merely postulated that the relationship between an attorney and his client is contractual in nature, a point not disputed by the respondent herein. No mention was made of the form of the action when a complaint is filed for professional malpractice. However, in *Mumford* v. *Stanton, et al.*, 254 Md. 697, 255 A.2d 359 (1959), the Court of Appeals of Maryland held that the liability of an attorney for negligent breach of his duties to his client sounds in tort and that the legal principles reserved for the field of torts applies. The court explicitly stated that a malpractice suit against an attorney is based upon a "negligent act" [page 364]. The court said:

> "Again, we would note that whether the action for professional malpractice be brought in contract or in trespass on the case, in order to establish liability, a negligent breach of duty must be proved." [*Ibid*]

Therefore, the incipient relationship between an attorney and his client pales to irrelevancy when an action is brought for professional malpractice. In such a case, a tort is alleged and the principles applicable to the recovery of compensatory and punitive damages normally apply.

B. Under Maryland Law, Actual Malice Need Not be Proven In Order to Recover Punitive or Exemplary Damages.

Under Maryland law, actual malice need not be shown in order for a party to recover punitive or exemplary damages against a tort feasor. A plaintiff must merely show that the defendant acted maliciously or, in the disjunctive, *wantonly*. See, *Dennis* v. *Baltimore Transit Co.*, 189 Md. 610, 56 A.2d 813, 816 (1948). The court in the *Dennis* case, went on to define the term "wanton" as follows:

> "The word 'wanton' means characterized by extreme recklessness and utter disregard for the rights of others." [Page 817]

In other words, in order to recover punitive damages, the plaintiff need not show that the defendant acted with spite or wilful mischief to injure, but only that he conducted himself with reckless disregard for the rights of the person he injured. See, *Dennis* v. *Baltimore Transit Co., supra.* Certainly, there are sufficient facts in this case to warrant a finding that Mr. Harvey Rosenberg acted with extereme recklessness and utter disregard for the rights of the plaintiffs herein.

The weight of authority in Maryland supports the view that actual malice need not be shown since a wanton act is sufficient for the trier of fact to return an award of punitive damages. See *Vancherie* v. *Siperly,* 243 Md. 366, 221 A.2d 356, 360 (1966). And the question of whether or not there is sufficient malice or wantonness to sustain an award of punitive damages is one of *fact,* for the trier of fact to resolve. See, *Vancherie* v. *Siperly, supra,* and *Great Atlantic & Pacific Tea Co.* v. *Paul,* 261 A.2d 731, (Md. App. 1970).

In *McClung-Logan Equipment Co., Inc.* v. *Thomas,* 226 Md. 136, 172 A.2d 494 (1961), the Court of Appeals of Maryland held in an action for wrongful conversion of personal property that punitive damages are properly a question for the trier of fact "where the act of defendant is accompanied with fraud, ill-will, recklessness, wantonness, oppressiveness, wilful disregard of the plaintiff's rights, or other circumstances tending to aggravate the injury" [p. 500]. Inherent in that holding is the principle that elements of malice and wantonness are often inferred from the facts and circumstances surrounding the conduct of the defendant and need not be proved by direct evidence.

The cases cited by petitioner on page 46 of his brief are not controlling. In *Damazo* v. *Whaby,* 259 Md. 627, 270 A.2d 814 (1970), the plaintiff sued for breach of contract and the court reversed a judgment against the defendant for both compensatory and punitive damages on the grounds that there was no evidence that he used his corporation as an instrument to perpetrate a fraud. Clearly, the plaintiffs would not be entitled to punitive damages if they did not establish a cause of action for compensatory damages or failed to prevail in their underlying cause of action against the defendant. Such is not the case here.

In *Safeway Stores, Inc.* v. *Barrack,* 210 Md. 168, 122 A.2d 457 (1956), the Court of Appeals of Maryland upheld an award of punitive damages in an action for malicious prosecution, a cause of action which requires malice to be shown in order to permit recovery of even compensatory damages. That case is no authority for the propositions advanced by the petitioner.

And in *Heinze* v. *Murphy,* 180 Md. 423, 24 A.2d 917 (1942), the Court of Appeals of Maryland again upheld

the right to recover exemplary damages, citing with approval an earlier Maryland case:

> "On the contrary, to entitle one to such damages, there must be an element of fraud, or malice, or evil intent, or oppression entering into and forming part of the wrongful act.
>
> * * * * * * * * *
>
> It is in such cases as these that exemplary or punitive damages are awarded as a punishment for the evil motive or intent with which the act is done, and as an example, or warning, to others." [Heinze v. Murphy, at page 921]

This case support the position of the respondents that the wrongful intent of Mr. Rosenberg was demonstrated by the facts in the case and were sufficient to allow for the recovery of punitive damages.

C. Under the Circumstances of this Case, the Award of Punitive Damages was Warranted by the Facts and Support the Objectives for Which Such Damages are Normally Recovered.

Although there are no reported cases in the District of Columbia or in the State of Maryland (or even in the vast majority of jurisdictions throughout the United States), in which punitive damages against an attorney for professional malpractice has been awarded, the rules and principles applicable to punitive or exemplary damages generally should be applied to legal malpractice, as they are to other professional malpractice actions. See, 27 ALR 3d 1274 for a compendium of cases in which punitive damages have been awarded in medical malpractice actions under principles equally applicable to this case.

In *Welder* v. *Mercer,* 247 Ark. 999, 448 S.W.2d 952, 954, (1970), the Supreme Court of Arkansas recognized

implicitly that an award of punitive damages against an attorney for professional malpractice would, in the proper case, be appropriate if an "intentional wrong or conscious indifference" is shown. A case such as this one against Mr. Rosenberg implores the award of exemplary or punitive damages since a reparative judgment alone would not serve the admonitory function that money damages normally fulfill. Something more is needed as a warning to other attorneys who hold a position of trust in their relationship with their clients. For the petitioner to loricate himself with the defenses that actual malice has not been shown and that no personal enrichment has been demonstrated by his varied legal maneuvers casts common sense to the winds and ignores the facts upon which a judgment was rendered. In a case such as this, money damages by itself would give succor to those who seek special advantage at the expense of their clients and, ultimately, would bring the legal profession into general disrepute.

The courts, in appropriate cases, must exact more than compensatory damages when members of the community have been hurt by the wanton, self-serving acts of an attorney. The award of punitive damages is a warning to all that the courts will not countenance breaches of trust and violations of the canons of ethics, and that members of the bar who are caught in such duplicity will suffer the full consequence of their wrongdoing. The problem has been stated once before:

> "The commission of some torts is to the advantage of no one; while other tortious conduct is directed toward and achieves an advantage for the tort feasor. In the first class of cases, the payment of 'compensatory' damages by the defendant results in a dead loss to him, but in the second class, the

> defendant can often pay compensatory damarges and still be in a position as good as, or better than, that which he occupied before the commission of the tort. Even though investigation may prove that 'compensatory' damages adequately fulfill the admonitory function in the first class of cases, it would seem that punitive damages are necessary in the second; for, while 'compensatory' damages provide a financial smart for a defendant who has not gained anything by his wrong, they merely result in the payment of a bargain sale-price for an advantage when the defendant has acted to further his own interests." *Punitive Damages in Tort Cases,* 44 Harv.L.Rev. 1173, (June 1931).

As the court held in *Superior Constr. Co.* v. *Elmo,* 204 Md. 1, 102 A.2d 739, 104 A.2d 581, 48 ALR 2d 932, 941 (1954), punitive damages are those which can be awarded in addition to compensatory or nominal damages against a person to punish him for his "outrageous conduct". Certainly, the award of punitive damages under the facts of this case are warranted to punish the petitioner for professionally outrageous conduct.

The record discloses that Harvey Rosenberg is an experienced attorney, having practiced law for twenty-two years (TR V.II, pp. 58-59); that he estimates that he acts as an incorporation attorney from five to fifteen times a year (TR V.II, p. 59); and that petitioner himself concedes that Mr. Rosenberg is "skilled in corporate law and [has served as] an incorporation attorney on numerous occasions."[8] Yet, this attorney:

—Advanced $22,597.60 of invested funds from Urban to Aardvark, which was also his client, without

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[8] Petition, page 13.

corporate approval and without initially obtaining promissory notes or any security for the loan. These funds were lost to the lender;[9]

—Transferred all the remaining assets of Urban to Ebony without a merger or any legal authority;[10]

—Advised a preferential transfer of assets to three investors to the detriment of the remaining seventeen;[11]

—Failed to advise the corporation and its stockholders to hold an initial meeting; to elect directors; to elect officers; to adopt bylaws; to conduct regular meetings; nor, did he advise the officers and directors of their fiduciary responsibilities;[12]

—Failed in his responsibility to prepare a registration statement and prospectus for a public offering.[13]

The District Court further found that the defendant "displayed an appalling lack of concern for the substantive law governing corporations he "counseled". For the nonfeasances, malfeasances, omissions and improper advice which made up his "services", Rosenberg was paid $3,875.00."[14]

These activities by an experienced corporate attorney far exceed the standards of outrageous conduct or

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[9] Findings of Fact, paragraphs 7, 8 and 9.

[10] Findings of Fact, paragraph 11.

[11] Findings of Fact, paragraph 20.

[12] Findings of Fact, paragraphs 5, 15, 16 and 17.

[13] Findings of Fact, paragraph 13.

[14] Conclusions of Law, paragraph 5.

wantonness required for punitive damages to be imposed. Whether these activities amounted to intentional wrongs or conscious indifference, the penalty imposed is justified by fact and law.

V

THE DISTRICT COURT DID NOT ERR IN AWARDING DAMAGES IN THE AMOUNT OF $15,062.15 AGAINST THE CORPORATE ATTORNEY FOR ADVISING THE RETURN OF THAT AMOUNT TO THREE INVESTORS AFTER THE INVESTORS HAD THREATENED TO SUE THE DEFENDANT PERSONALLY.

The Trial Court found that Mr. Rosenberg advised the return of funds to the three New York investors even though he knew that this was improper.[15]

In justifying this finding, the Court found as a fact that ". . . Rosenberg urged that funds totalling $15,062.15 be returned to the three investors because he feared that legal action would be taken against him personally if he acted otherwise." [16]

At the time these funds were returned, there had been a substantial depletion of the corporate assets. The corporation did not have any income during its entire existence and by July of 1969 there had been a steady outward flow of invested funds. The actual amount of money on hand at this time is not reflected in the record, but by January of 1970, some six months later, the total investment of $91,000.00 was depleted to approximately $9,000.00. Thus, had there been a liquidation of the corporation in July of 1969, each creditor would have received approximately 50% return on his loan. Therefore, the return of the full

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[15] Conclusions of Law, No. 6.

[16] Finding of Fact, No. 22. See also, the Court's Findings, No. 20 and 21.

amount represented a preferential transfer which is an act of bankruptcy.[17]

This return represents a substantial loss to the remaining investors who will receive less than a full refund even if this judgment is fully paid and satisfied.

Once again, petitioner stretches the record to meet his own claims: Rosenberg did not "specifically" note that the repayment should be limited to the amount of the principal. See, (TR V.II, p. 12). This effort to pin liability for the transfer upon the inexperienced corporate president is illfounded—particularly when the Court found the recommendation of counsel was based on his own personal concern over a threatened lawsuit.

The judgment of the Court as to this amount is a finding of professional malpractice against a corporate attorney in that he placed his own personal interest above that of his client.

The Canons of Ethics set forth this duty in the following manner:

> "The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client." [18]

This award of damages against Rosenberg is well supported by the evidence before the Court and the Petition should be denied.

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[17] Title 11, U.S.C., Section 96.

[18] Code of Professional Responsibility, Canon 5, EC5-1.

CONCLUSION

The Petition for Certiorari should be denied in that Petitioner has not met nor set forth any criteria pursuant to Rule 19 of the Supreme Court Rules.

Petitioner has cited no decision in conflict with another circuit; he has cited no conflict with applicable decisions of this Court; nor, has there been any showing that the United States Court of Appeals for the District of Columbia Circuit has in any way departed from the accepted and usual course of judicial proceeding.

Respectfully submitted,

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